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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 184.

DONALD M. HILL, JAY R. BENTON and GEORGE R. BILLINGS, Executors of the Will of Warren M. Hill, Petitioners,

v.

CHARLES S. SMITH.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

PETITIONERS' BRIEF.

EDWARD E. BLODGETT,
GEORGE S. FULLER,
IRVING F. CARPENTER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 164.

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

v.

CHARLES S. SMITH, RESPONDENT.

BRIEF FOR PETITIONERS.

Pursuant to writ of certiorari granted by this Court there has been certified to this Court for review and determination the cause, the record of which remains in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, numbered 79103 wherein your Petitioners were the defendants and your Respondent was the plaintiff, and wherein final judgment was entered by said Superior Court pursuant to a decision of the Supreme Judicial Court for said Commonwealth reported in 232 Mass. 188.

For clearness and convenience your Petitioners, whenever referred to herein, are called the debtor, and your Respondent the creditor. The italics throughout this brief are ours.

This action was brought by Respondent (the creditor) in the said Superior Court for the County of Suffolk and

Commonwealth of Massachusetts by a writ dated March 30, 1914, on a judgment for $4,478 secured by him on the second day of May, 1904, against Warren M. Hill (your Petitioner's testator), late of Boston, Massachusetts. The cause of action upon which the judgment had been founded did not appear. The defendant's answer set up a discharge in bankruptcy ordered by the District Court of the United States for the District of Massachusetts on the third day of December, 1912, discharging the said Warren M. Hill from all provable debts and claims which existed on the twentieth day of June, 1912, on which day the petition for adjudication had been filed by him; excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

After the commencement of the suit and before the trial the said Warren M. Hill died (October 26, 1915) and your Petitioners were cited in as defendants. The creditor having proved the judgment and that it remained unsatisfied, rested. The debtor introduced in evidence a certified copy of the discharge in bankruptcy of the said Warren M. Hill and rested. The creditor then introduced in evidence in rebuttal a certified copy of the schedule of creditors filed in the bankruptcy proceedings of said Warren M. Hill in which schedule the name of the creditor, Charles S. Smith, did not appear. No evidence other than the foregoing was introduced by either party.

The Superior Court ruled, at the request of the debtor, as follows:

(1) That the certified copy of the discharge in bankruptcy on the facts in this case was prima facie evidence that the creditor's debt was properly scheduled and that the plaintiff was duly notified of the bankruptcy.

(2) That the burden was upon the plaintiff (the credi-

tor) to show that his debt or judgment was not scheduled according to law in the list of claims filed in the Bankruptcy Court prior to the discharge in bankruptcy.

(3) That in arriving at a finding in this case the Court must assume, unless by a preponderance of the evidence the plaintiff (the creditor) had shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the Bankruptcy Law.

(4) That the plaintiff's (the creditor's) claim was a provable debt under the Bankruptcy Act.

The debtor also requested the Superior Court to rule that the burden was upon the creditor to show that he was not notified of the proceedings in bankruptcy and that the burden was upon the creditor to show that he had no knowledge of the proceedings in bankruptcy. The Superior Court refused to make either of the foregoing rulings as requested and found for the creditor in the amount of $8,150.

The case was then taken to the Supreme Judicial Court for the Commonwealth of Massachusetts upon the debtor's exceptions to the finding of the Superior Court and to its refusals to rule as requested. The Supreme Judicial Court, however, overruled the debtor's exceptions and the case went back to said Superior Court for the entry of final judgment.

Thereafter on the sixth day of June, 1921, final judgment was entered for the creditor (the original plaintiff) in the said Superior Court for the County of Suffolk pursuant to rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts.

STATUTES.

The pertinent part of the Federal statutes involved in the consideration of this case are as follows:

A. Section 17 of the Bankruptcy Law (Act of July 1, 1898, c. 541, 30 Stat. at L. 544) as amended by the Act of February 5, 1903, c. 487, 32 Stat. at L. 797 (this case arose prior to the Amendment of 1917), which provided as follows:—

> *"Debts Not Affected by a Discharge*
>
> Section 17a. A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and allowance, **with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . .**"

B. Section 21f of the Bankruptcy Law, which provided as follows:

> "A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, **the regularity of the proceedings, and of the fact that the order was made.**"

ARGUMENT.

A.

STATEMENT OF THE POINT RAISED BY THIS CASE.

A. Starting with the basic principle which was clearly established by the case of *Kreitlein v. Ferger*, 238 U. S. 21, to wit: that the debtor having made out a prima facie defense by proving his discharge in bankruptcy, the burden then was cast upon the creditor "to show that . . . the debt sued on was by law excepted from the operation of the discharge"—the question raised by the record in this case boils down to this:

Can it be said that the creditor has sustained that burden by proving merely that his name did not appear in the debtor's bankruptcy schedule?

B. To sustain the judgment of the Massachusetts court in the case at bar will necessitate a holding by this Court that that question should be answered in the affirmative. There can be no escape from it. *The entire evidence is in the record* (see pp. 12–13 of the Transcript of Record). The creditor having proved that his judgment remained unsatisfied and the debtor having proved his discharge, the creditor "introduced in evidence in rebuttal a certified copy of the schedule of creditors *in which schedule the name of the plaintiff Charles S. Smith did not appear. No evidence other than the foregoing was introduced by either party.*" **Unless this court is willing to establish it as a rule of law that the fact that the name of a judgment creditor does not appear in the judgment debtor's schedules in bankruptcy is sufficient, in and of itself, to defeat the effect of the proof of the debtor's discharge in bankruptcy, then the judgment of**

the Massachusetts court in the case at bar cannot be sustained and must be reversed.

B.

STATEMENT OF THE FUNDAMENTAL PRINCIPLES INVOLVED IN CONSTRUING THE BANKRUPTCY ACT.

A. In the consideration of the various questions raised in this case and in construing the Bankruptcy Act, it should constantly be borne in mind that one of the main purposes of the Act is to provide a means whereby the unfortunate debtor may be relieved from the burden of hopeless insolvency.

Neal v. *Clark*, 95 U. S. 704.

Burlingham v. *Crouse*, 228 U. S. 459, where the court says at page 473:

> "It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among the creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the Act must be construed."

Stellwagen v. *Clum*, 245 U. S. 605, where the court says at page 617:

> "The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great

stress upon this feature of the law as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life."

Traer v. *Clews*, 115 U. S. 528 at 541.

B. The discharge of the debtor is one of the main, if not the most important, feature of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588.

Stellwagen v. *Clum*, 245 U. S. 605, at 616.

C. And *particularly* should it be borne in mind that the exceptions created by Section 17 should be considered from the point of view that they were inserted in the act in order to *confer upon certain* classes of creditors *the benefit* of being excepted from the operation of the discharge.

Friend v. *Talcott*, 228 U. S. 27.

In this case White, C. J., after going somewhat into the history of the provisions of the former Bankruptcy Act as to excepting debts from the operation of the discharge, points out that the right which the present Bankruptcy Act *confers* upon enumerated classes of debts to be exempt from the operation of the discharge, does not rest upon the conception that such debts are exempt because they are excluded from the Act and may not participate in the distribution of assets. "The confusion lies in not distinguishing between creditors who are excluded from the Bankrupt Act and those who although included therein *have had conferred upon them the benefit of an exception from the operation of the discharge.*"

1. This point seems to have been overlooked in the opinion of the dissenting justices in the *Kreitlein* case.

2. It also seems to have been overlooked by the Massachusetts Supreme Court in this case for that court in its opinion said: "Since the discharge is for the benefit of the debtor and not of the creditor, there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor, and not by the debtor." But the whole Bankruptcy Act was created for the debtor, not merely the discharge. The discharge is a principal requisite of every true bankruptcy act. See *Stellwagen* v. *Clum* (*supra*) at 616. It was the creditor for whose benefit the exceptions in § 17 were created.

C.

THE MASSACHUSETTS SUPREME COURT CLEARLY ERRED IN SUSTAINING THE JUDGMENT OF THE LOWER COURT.

The two fundamental respects in which the Massachusetts courts erred were: (1) That they obviously presumed certain facts which were vital in order to warrant a judgment for the creditor, of which facts there is no evidence in the record; and (2) that the judgment of the creditor was based also upon the proposition that the burden was on the debtor in this case to show that the creditor had notice or actual knowledge of the bankruptcy proceedings.

The debtor respectfully submits that either of these errors is sufficient in itself to warrant this Court in reversing the judgment of the Massachusetts court and in holding that judgment ought to have been entered for the debtor.

I. As to the Erroneous Conclusion of Fact.

A. It is obvious that the Massachusetts court did presume either (a) that the debtor had failed to schedule *at all* the creditor's debt; or (b) that, assuming the debt had been scheduled, that the creditor's name was known to the bankrupt. One of those facts must have been found in order that the creditor's debt could come within clause 3 of Section 17 of the Bankruptcy Act and thus be excepted from the operation of the debtor's discharge. But the debtor insists that on the record as a matter of law *neither* of those facts could be found or presumed.

B. Paraphrasing a part of the opinion of the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, at 611, and applying it to the case at bar as it comes up on the record, the debtor's position on this point is as follows:

> "It is insisted that there is no presumption that the debtor violated" the Bankruptcy Act by not duly scheduling the debt in question, "and that there is no evidence in the record to support such conclusion, and while it is conceded that ordinarily" upon writ of certiorari "to a state court, this court does not review the findings of fact, **yet it is insisted that in this case a Federal right has been denied, as the result of a finding of fact which is without support in the evidence**; that the evidence is before" this court "in the record by which that insistence may be tested; and that" the question whether or not this debt was duly scheduled "is a mixed question of law and fact so that **it is incumbent upon" this court "to analyze the evidence to the extent necessary** to give in the plaintiff in error (the debtor in this

case) the benefit of its asserted Federal right. **Such an insistence as to the power and duty of this court in such a case is well founded."**

See also *Creswill* v. *Knights of Pythias*, 225 U. S., 246, at 261.

C. The case came before the Massachusetts Supreme Court on the debtor's "exceptions to the refusals to rule, and to the finding". (See Transcript of Record p. 18.) The exception to the finding obviously raises the question whether the finding can be supported by the record. And this point is particularly raised by the following statement of the Massachusetts Supreme Court in the last paragraph of its opinion in this case: "The plaintiff met the prima facie proof made out by the discharge by proof from the record of the bankruptcy court *that his debt was not scheduled by the bankrupt.*" (Transcript of Record, p. 22.) But, the ~~creditor~~ debtor submits, the record shows that there was **no such proof.**

D. Whether the debt was *in fact* scheduled does not appear. There is no evidence in the record to support the conclusion that the debt was not scheduled. The **whole record as to this point** is contained in the 3rd paragraph of the Bill of Exceptions, which reads as follows:

> "The defendant introduced in evidence a certified copy of the discharge in bankruptcy of Warren M. Hill and rested. The plaintiff introduced in evidence in rebuttal a certified copy of the schedule of creditors in bankruptcy of Warren M. Hill in which schedule *the name* of the plaintiff Charles S. Smith did not appear. *No evidence other* than the foregoing was introduced by either party."
>
> (Transcript of Record, pp. 12–13.)

1. That Bill of Exceptions is all that the Massachusetts Supreme Court had before it. It does not state or even intimate that the debt was not scheduled. The statement that "no other evidence was introduced by either party" shows that there was no evidence on that point before the trial court.

2. The burden was on the creditor, and *not* on the debtor, to establish that the debt was not duly scheduled.

Kreitlein v. *Ferger*, 238 U.S. 21.
Manheim v. *Loewe*, 173 N. Y. S. 260; 185 App. Div. 601.
Re Peterson, 121 N. Y. S. 738; 137 App. Div. 435.

3. The first essential fact which it was the creditor's duty to establish *was that the debt was not duly scheduled*, with the name of the creditor if known to the debtor. To establish this there necessarily had to be evidence

either (1) that the debt was not scheduled at all
or (2) that it was not scheduled in the name of the creditor **and** that the name of the creditor was known to the debtor.

If it were a fact that the debt was not scheduled *at all*, the *only reasonable inference* is that the creditor would have seen to it that the Bill of Exceptions so stated rather than state the mere fact that his name did not appear in the schedules—**i. e. only the first element of (2)—leaving the record showing that there was no evidence as to the second element of (2).**

a. The Bill of Exceptions as a matter of law conclusively established what the evidence was in the trial court. Also the creditor in this case, by the endorsement by his attorney of record of his consent to the Bill of Exceptions, expressly approved that

Bill of Exceptions as fully stating the case as it was tried.

(Transcript of Record, p. 14.)

b. The creditor was charged with knowledge of the law that the introduction of the order of discharge cast upon him (the creditor) the burden of showing that his debt was excepted from the operation of the discharge, particularly as the decision in the *Kreitlein* case was handed down by this court on June 1, 1915, and the trial of the case at bar did not take place until November 15, 1917.

(Transcript of Record, p. 11.)

4. If there is any presumption of fact to be made at all in this case it should be that the debt *was* duly scheduled.

Bankruptcy Act, Section 21f.

Niles v. *Havens*, 190 N. Y. S. 656; 198 App. Div. 546, where the court says that upon proof of the bankrupt's discharge the presumption is "that the bankrupt's debts were scheduled properly. . . ."

Re Peterson, 121 N. Y. S. 738; 137 App. Div. 435, where the court, referring to Section 21f, says: "Under this provision it would be presumed that the debts in question were scheduled properly.

Manheim v. *Loewe*, 173 N. Y. S. 260; 185 App. Div. 601.

Larsen v. *Hyman*, 126 N. Y. S. 100.

a. "Experience teaches us that things are generally rightly done. That to do things wrongly is the exception, not the rule. Therefrom certain convenient and lenient legal presumptions arise and are universally indulged by courts when called for in

administering justice, to wit: **All things are presumed to be lawfully done until proof be made to the contrary.** (2 Co. Litt. (1 Am. Ed.) 232b.) **All things are presumed to have been rightly and duly performed until it is proved to the contrary.** (Co. Litt. 232, Ibid.) Agreeably to those presumptions run the trite ones that innocence is presumed, that negligence is not presumed, and many more of the family of friendly inferences."

Hartwell v. *Parks*, 240 Mo. 537 at 540.

5. The fact that the creditor's name did not appear in the schedule is not evidence, and does not warrant any presumption, that the debt was "not duly scheduled" within the meaning of said clause (3), for that clause requires the name of the creditor *only if known* to the bankrupt.

a. Said clause (3) excepts debts which have not been scheduled "with the name of the creditor *if known to the bankrupt*".

b. The context of that clause indicates that Congress contemplated that a debt might be duly scheduled even though the creditor's name did *not* appear. A study of the arrangement of that clause and particularly of its punctuation makes it clear that the **only** *instance where the failure of the creditor's name to appear in the debtor's schedule becomes material* in determining whether the debt came within the class of debts excepted by that clause from the operation of the discharge is the instance *where* **that creditor's name was known to the bankrupt.** It follows then, that if the creditor in attempting to establish that his debt was not duly scheduled, wishes to rely on the failure of his name

to appear in the schedule, he must, in addition thereto show that his name was known to the debtor.

See *Kreitlein* v. *Ferger,* 238 U. S. 21, at 32-33, where this Court, in considering the creditor's contention that the scheduling of his debt was fatally defective because the street and number of his residence were not given, and referring to the Bankruptcy Rule which provides that the schedules "should state the street and number of their residence or place of business *so far as known*", said:

"But without considering the effect of such Rule, *it is sufficient to say that,* in the present case, *there was nothing to show* . . . that Kreitlein (the debtor) *knew such address* at the time he made the schedule."

c. For aught that appears in the record in this case the debt which became merged in the judgment may have been in the form of a note of which the creditor may have been an indorsee and the debtor the maker, and the debt may have been scheduled as a note with the payee as the creditor, the debtor not knowing who the indorsee was. It is just as reasonable that such an inference be drawn from the record as any other inference. And if the debt had been so scheduled it would not necessarily follow that the debt had not been *duly* scheduled.

Kreitlein v. *Ferger,* 238 U. S. 21 at 28.

6. That this unfounded conclusion of fact that the debt had not been scheduled must have had an important bearing in inducing the Massachusetts Supreme Court to sustain the judgment of the lower court is apparent from the following excerpts from the opinion of the court:

a. After quoting the beginning and clause (3) of

Section 17 of the Bankruptcy Act, the court went on to say:

> "The fair implication of these words is that the person who asserts the force of the discharge as a bar must show *in those instances where the debt has not been scheduled as required by law* and hence is within the exception to the bar of the discharge in bankruptcy, that nevertheless the debt is barred because within the excepted class of such unlisted debts belonging to creditors who either had notice or actual knowledge of the proceedings."
>
> (Transcript of Record, p. 20.)

b. Again, when referring to the effect of a discharge in bankruptcy as being a bar to debts, the court went on to say:

> "But if the creditor, through no fault of his own *but wholly through the fault of the debtor upon whom is cast that duty by the law,* has no notice or knowledge of the opportunity afforded him to appear in bankruptcy court, there appears to be no natural justice in holding him bound by its adjudication."
>
> (Transcript of Record, p. 21.)

Here the Court assumes fault of the debtor **without proof of such fault** within the terms of the Act. No fault is shown under the terms of the Act by evidence that the *creditor's name* does not appear in the schedule unless it is also shown that the debtor knew his name.

This is contrary to the well established rule that a person *shall be presumed innocent* and that such a charge *must be clearly proved by the party making it.*

10 Ruling Case Law, Evidence, Section 49.

1 Greenleaf, Evidence, Sections 78, 81.

c. Then again, a little later, the court said:

"A mere proffer of a discharge in bankruptcy, *without facts to show that an unscheduled creditor* by the terms of the act became subject to the jurisdiction of the bankruptcy court, does not make the discharge effective as to such creditor."

(Transcript of Record, p. 21.)

d. Still further on in its opinion the court said:

"Since the discharge is for the benefit of the debtor and not of the creditor there would seem to be a defect in the law if the burden of proving negative consequences *arising from the default of the debtor* should be borne by the creditor and not by the debtor."

(Transcript of Record, p. 21.)

Here, as in (b) *supra*, default is **assumed without proof.**

e. And finally, in the last paragraph of its opinion, the court said:

"There was no legal inconsistency or reversible error in ruling that the discharge in bankruptcy was on the facts prima facie evidence that the plaintiff's claim was scheduled and that the burden of producing some evidence to meet this prima facie proof rested upon the plaintiff and at the same time finding in favor of the plaintiff. The plaintiff met the prima facie proof made out by the discharge *by proof from the record of the bankruptcy court that his debt was not scheduled by the bankrupt.*"

The evidence does **not show** that the debt was not scheduled but **merely** that in the schedule the **name** of the creditor did not appear.

E. There was no evidence in the record to warrant any presumption or conclusion of fact by the court that the debtor knew the creditor's name at the time he prepared his schedules in bankruptcy.

1. It was easy for the creditor to have shown that his name was known to the bankrupt (the debtor) and as the burden was upon him (the creditor) to establish that his debt was excepted from the discharge, the presumptions were against the fact of such knowledge rather than for it. Absence of evidence upon any material point is as fatal to him who has the onus as the absence of all evidence would be.

McDaniel v. *Traylor*, 212 U. S. 428 at 434.

Steele's Adm. v. *Hillman Land & Iron Co.*, 114 S. W. 311 (Ky.).

2. The only process of reasoning by which the court could have arrived at the conclusion that the name of the creditor was known to the debtor was as follows: That because the judgment had been entered against the defendant it should be presumed that the debtor had been duly served with process, and therefore having been duly served with process it must be presumed that the debtor knew the creditor's name. But it is well settled that a material fact necessary to a party's case cannot be held to have been established by a mere presumption which is itself based upon another presumption.

U. S. v. *Ross*, 92 U.S. 281.

Manning v. *John Hancock Mutual Life Ins. Co.*, 100 U.S. 693.

3. But even the presumption that there had been due service of process in the original action would

not warrant any presumption that the debtor knew the creditor's name, for personal service on the debtor, is not a necessary element for a judgment. Other forms of service might have sufficed—*e. g.* publication or leaving copy at last place of abode—Mass. Rev. Laws, c. 170 and c. 167, §§ 31, 34, all of which fall far short of actual notice to the debtor and from none of which would a presumption be warranted that the debtor had actual knowledge of the name of the plaintiff (the creditor). And if in fact there had been personal service on the debtor, that fact could easily have been established by the creditor and made to appear in the record.

4. The mere fact that the creditor had secured a judgment against the debtor in 1904 is not evidence, and does not warrant any presumption, that the creditor's "name was known to the bankrupt (the debtor)" in 1912 when he prepared his schedules in bankruptcy.

a. It will not be presumed that a person who once had knowledge of a fact retained such knowledge for a considerable length of time, or that a fact once known to a person will always be present in his memory.

Hall etc. Co. v. *Haley etc. Co.*, 174 Ala. 190 where the Court says:

"The law does not presume that a fact once known is never forgotten, for this is contrary to all human experience."

b. This principle seems to have been recognized by this court in the *Kreitlein* case for in the last paragraph of its opinion the court says (at p. 34):

"These schedules are often hurriedly prepared, long after the date of the transaction out of which the debt grew, and where books and papers, which might otherwise have furnished a more complete address, have been lost or destroyed."

c. A presumption must be based on some necessity and the court will not go into the domain of presumption where direct proof can be obtained.

22 Corpus Juris, Evidence, 83.

5. This point was definitely raised and decided in the well-considered case of *Morency* v. *Landry*, 79 N.H. 305. In that case the creditor's name did not appear in the schedule, and the court after referring to the rule established by the *Kreitlein* case as to the burden being cast upon the creditor to show that his debt was excepted from the operation of the discharge and relying *solely* upon that rule, said:

"*This imposed on the plaintiff (the creditor) the burden of offering evidence tending to show that Landry (the debtor)*, when he filed his petition, *knew Morency's (the creditor's) relation to him as a creditor*, thro the bank judgment. *No such evidence was offered* and there was no error in the order dismissing the appeal."

See also *Steele* v. *Talheimer*, 74 Ark. 516 and the *Kreitlein* case. In the latter this Court said, in referring to the Bankruptcy Rules of one of the New York Districts wherein the debtor is required to list the "residence" of the creditor *so far as known*, said:

"But without considering the effect of such a

rule it is sufficient to say that there was nothing to show that K. (the debtor) knew such address at the time he made the schedule."

F. The well-established rule that a person shall be presumed innocent until he is proved guilty would seem in itself to be sufficient to make it clear that any presumption that the debtor knew the creditor's name when he made his schedules was improper. Such a charge against a debtor should have to be clearly proved by the party making it.

10 Ruling Case Law, Evidence, Section 49.
1 Greenleaf, Evidence, Sections 78, 81.

G. Any such presumption is contrary to the spirit and purpose of the Bankruptcy Law.

(1) The provision of the law relating to the discharge of bankrupts should *not* be construed against the bankrupt nor should all implications and doubts be resolved against him, for the release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and of the general public is one of the main, if not the most important, objects of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588 (C. C. A. 5th Cir.).

See also *Burlingham* v. *Crouse*, 228 U.S. 459 at 473.

See also *Wetmore* v. *Markoe*, 196 U. S. 68 at 77, where the Court said: "The Bankruptcy Law should receive such an interpretation as will effectuate its beneficient purposes. . . ."

II. As to the Question of Burden of Proof of Notice or Actual Knowledge of the Bankruptcy Proceedings.

A. The debtor submits that, notwithstanding the conclusion which the Massachusetts Courts, in giving judgment for the creditor, evidently must have made as to the due scheduling of the debt, nevertheless the Massachusetts courts clearly erred in ruling that the burden was on the debtor to show that the creditor had notice or actual knowledge of the bankruptcy and in giving judgment for the creditor based upon such a ruling.

B. A plea of a discharge in bankruptcy is a plea in bar.

21 Ruling Case Law, Pleading, Sec. 109 and cases cited.

C. It is not an unconconscionable or odious defense to an action to recover a debt and has been referred to as being similar to the defense of the statute of limitations.

Citizen's Nat'l Bank v. *Branden*, 19 N. D. 489.

D. Such a plea shifts to the creditor, if he would avoid it, the burden of *proof*. The only burden of proof upon the debtor who has pleaded his discharge in bankruptcy is to prove that discharge. That burden is completely sustained by the introduction of a duly authenticated copy of the order for his discharge. The burden of *proof*, not merely the burden of evidence, is thereupon placed upon the creditor, if he would avoid the plea by any exception in the statute, to establish that he comes within that exception.

(1) Such is the clearly established doctrine where the statute of limitations is pleaded.

Piatt v. *Vattier*, 9 Pet. 405, 416.

Ross v. *Duval*, 13 Pet. 45.
Marsteller v. *M'Clean*, 7 Cranch, 156.
Pierce v. *Perry*, 189 Mass. 332.

(2) Such a doctrine should also apply where a discharge in bankruptcy is relied upon.

a. One of the main purposes of the bankruptcy statute like that of the statutes of limitations is the quieting of litigation with respect to debts within the scope of such statute and the relief of such debtors.

b. Such a result was reached in the *Kreitlein* case although without reference to the analogy to the case where the statute of limitations is pleaded—the court holding that "the introduction of the order makes out a prima facie defense" (note that this Court speak of it as a prima facie *defense* rather than as prima facie *evidence*).

E. That the burden should be upon the creditor to show that his claim is excepted by law from the operation of the discharge is the obvious conclusion from a study of the history and purposes of the Bankruptcy Law as shown in the various decisions of this Court construing said Law.

(1) The policy of the Bankruptcy Law "was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities and enable him to take a fresh start." The decisions of this Court "lay great stress upon this feature of the law".

Stellwagen v. *Clum*, 245 U.S. 605, at 617.
Traer v. *Clews*, 115 U.S. 528, at 541.
Burlingham v. *Crouse*, 228 U.S. 459, at 473.
Wetmore v. *Markoe*, 196 U.S. 68, 77.

(2) The rule thus established, placing the burden on the creditor to show that his claim is excepted from the operation of the discharge, is "concordant with equity and consistent with the object and intention of Congress in enacting" the Bankruptcy Law. "A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system."

Cf. Neal v. *Clark,* 95 U. S. 704 at 709.

F. "In view of the well known purposes of the Bankruptcy Law, exceptions to the operation of a discharge should be confined to those plainly expressed."

Gleason v. *Thaw,* 236 U.S. 558, at 562.

G. It is a well established rule of statutory construction that where a statute creates a right or rights and certain exceptions are made in the clause creating such rights, the burden is upon the party claiming such a right not only to plead the statute but also the facts negativing the exception.

Black, Interpretation of Laws, p. 429.
Sedgwick, Construction of Statutes and Constitutional Law, 2nd Ed. pp. 50, 93.
Potter's Dwarris on Statutes, p. 119;
Lewis' Sutherland, Statutes and Statutory Construction, 2nd Ed. Sec. 351 (p. 671).

1. It is incumbent upon one claiming "a peculiar right given by a statute—a right not common to all, and which is given only when a prescribed state of facts shall exist", to show the existence of *that state of facts.*

The "Edith" (*Poole v. Tyler*), 94 U. S. 518, at 522.

2. In our case the creditor claims the "peculiar

right" of having his debt excepted from the operation of the debtor's discharge. Clause (3) of Section 17 of the Bankruptcy Act *confers upon him the benefit of such an exception.*

Friend v. *Talcott*, 228 U. S. 27, at 38–40.
Kreitlein v. *Ferger*, 238 U. S. 21.

3. The "prescribed state of facts" which must exist to enable the creditor to claim the "peculiar right" given him by said clause (3) is namely:—that the debt had "not been duly scheduled, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

4. Said clause (3) is devoted to defining only one *class* of debts, which is benefited. Not all but only *certain* unscheduled or improperly scheduled debts are included in that class. See *Delta County Bank* v. *McGranahan*, 37 Wash. 307, 309. In defining that class the statute starts in by referring to a broad general class, *i. e.*, debts not scheduled with the name of the creditor, *but then* it limits that general class by adding certain qualifications or exceptions, to-wit:—that the name of creditor must have been known to the debtor; that the creditor must have had no notice; and that the creditor had no actual knowledge of the bankruptcy proceedings. Therefore, unless *all three* of those exceptions are negatived clearly the debt cannot be said to have been brought within the class of benefited debts created by said clause (3).

5. It is a well established rule of evidence that where a negative is essential to the existence of

a right, the party claiming the right has the burden of proving such negative.

10 Ruling Case Law, Evidence, Sec. 49.

Freeman v. *Blount,* 172 Ala. 655.

Colorado Coal Co. v. *United States,* 123 U. S. 307 at 319.

H. It must follow, then, that in order for creditor to bring his debt within the class excepted by said clause (3) from the operation of the discharge the following **three or four distinct and essential facts must have been established by evidence.**

1. *Either* (a) that the debt was not scheduled in time for proof and allowance,

or (b) that it was not so scheduled in the name of the creditor **and** that the name of the creditor was known to the debtor.

Morency v. *Landry,* 79 N.H. 305, 108 Atl. 855.

Steele v. *Thalheimer,* 74 Ark. 516.

Also, if 1 (a) or 1 (b) are established by the evidence then it must appear,

2. that the creditor had no notice,

and 3. that the creditor had no actual knowledge of the proceedings in bankruptcy.

Laffoon v. *Kerner,* 138 N.C. 281.

Manheim v. *Loewe,* 173 N.Y. Supp, 260; 185 App. Div. 601.

Re Peterson, 121 N.Y. Supp. 738; 137 App. Div. 435.

Thompson v. *Caverly,* 148 Ill. App. 295 (semble).

J. In the case at bar none of these facts (1 (a), 1 (b), 2, or 3) were established by any evidence. All of these

three or four facts (as the case may be) being essential facts which must appear in order to bring the debt within said clause (3), it follows that the creditor had the burden of establishing, or at least of going forward with the evidence to establish these essential facts, and he certainly **cannot be held to have sustained that burden by showing nothing but one of the necessary elements of 1 (b).**

1. In the case of *Morency* v. *Landry, supra*, it appeared that the debt was not scheduled under the name of the creditor, J. A. Morency, but no evidence was offered as to whether the bankrupt knew Morency's relation to him as a creditor. The court held that the Bankruptcy Law as construed by this Court imposed upon the creditor the burden of showing that the bankrupt knew Morency's relation to him as a creditor. It should also be noted that, although the lower court in that case *had found* that the creditor *had actual knowledge*, yet the validity of that finding was one of the questions which was also apparently open on the appeal and the New Hampshire Supreme Court expressly left that question out of consideration and ignored that finding, saying that their conclusion on the question of burden of offering evidence as to the debtor's knowledge of the creditor's name rendered it "unnecessary to consider whether the mailing of notices to F. Morency and F. Morency & Co. authorized the finding that J. A. Morency (the creditor) had actual knowledge of the proceedings.

2. In the *Peterson* case (*supra*) the question was whether a discharge in bankruptcy having been

shown, it was necessary for the debtor to show that the claims were *not* excepted from the operation of the discharge, and the court, in holding that such burden was *not* upon the debtor but upon the creditor, said: "In order to defeat the discharge . . . the burden was upon the plaintiff (the creditor) to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge. If the appellants (the creditor) claimed their debts were excepted because not properly scheduled, and they had no notice or knowledge . . . they had the burden of showing the facts upon which their claim rested."

3. In the case of *Manheim* v. *Locwe* (*supra*), action was brought upon two promissory notes which came due in 1908. The debtor produced a certified copy of his discharge in bankruptcy which had been granted him in 1912 and rested. No evidence was offered either as to the schedules or as to notice and the court after referring to the following statement in the case of *Hyde Park Flint Bottle Co.* v. *Miller*, 166 N.Y.S. 110; 179 App. Div. 73:— "The burden of proof rests upon the defendants to show that the judgment was discharged. One element necessary to prove this fact is that it was duly scheduled. This they failed to do", went on to say as follows:

> "But this statement as to the burden of proof is inconsistent with the law as laid down in Kreitlein vs. Ferger, and the other New York case (re Peterson, supra), which is controlling and which holds to the contrary, and places

the burden of proof upon the creditors to show that their claim was not properly scheduled *and* they did not have notice of the bankruptcy proceedings."

4. In the case of *Laffoon* v. *Kerner* (*supra*), *Larsen* v. *Hyman*, 126 N.Y. Supp. 100, and re Peterson, 121 N. Y. Supp. 738, the debtor in each instance rested after having proved his discharge in bankruptcy, and there was no evidence either as to the schedules or as to notice, and the court, in making the same holding as in *Manheim* v. *Loewe* (*supra*) used substantially the same language as that quoted in the preceding paragraph.

5. In so far as the opinion in the case of *Bailey's Adm.* v. *Gleason*, 76 Vt. 115, is contrary to rules laid down in the cases above referred to, it must be considered as in effect overruled by the Kreitlein case. The Vermont case, although recognizing the general rule that the burden is not upon the debtor to show that the debt is not within any of the excepted classes and that it is for the creditor by his replication to bring the debt within some exception, nevertheless attempts to attribute a different character to the class of debts covered by clause (3) and establish an exception as to that class from such general rule by holding in effect that a debtor in pleading a discharge in bankruptcy must also make such allegations as will show either that the debt was duly scheduled or that the creditor had knowledge of the proceedings. In the Kreitlein case not only did this Court say that, upon the introduction by the debtor of the order for discharge, the burden is

"then cast upon the plaintiff (the creditor) to show that, because of *failure to give notice* or other statutory reason, the debt sued upon was by law excepted from the operation of the discharge", but this Court also pointed out that the debtor in that case had *unnecessarily* offered in evidence the schedule to show that the creditor was listed.

K. It must be held to be contrary to the Bankruptcy Law, as construed by this Court, to presume, in favor of the creditor, merely from the fact that the creditor's name did not appear in the schedules, any of the other three facts which the creditor must also show in order to make out his case, *i. e.*, to show that his debt is excepted from the operation of the discharge. To hold otherwise would in effect be a denial of the rule that the burden was upon the creditor to bring his debt within the excepted class, for to bring it within that class —e. g. clause (3)—at least three or four distinct facts must appear (see paragraph H H on page 25 above) and it certainly would be taking two inconsistent positions to hold that the burden is upon the creditor to bring his debt within a class to do which at least three or four essential facts must be made to appear and then at the same time hold that the creditor need offer evidence of only one of those facts and that the other two or three essential facts may be presumed from that one fact.

L. The presumption, if any, in the case at bar, is that the creditor *did* have notice or actual knowledge of the bankruptcy proceedings.

1. Section 21f of the Bankruptcy Law creates a statutory presumption as to the regularity of the

proceedings, and it has been held that under this section it would be presumed that the debts were properly scheduled and that the creditor had notice.

Re Peterson, 121 N.Y. Supp. 738, at 740; 137 App. Div. 435, at 438.

Niles v. *Havens*, 198 App. Div. 546; 190 N. Y. S. 656.

See also *Hartwell* v. *Parks*, 240 Mo. 537 at 540 (on p. 12 supra).

2. In this case the material fact was a negative fact. If the creditor had no notice or actual knowledge of the bankruptcy proceedings no one could know that fact better than the creditor himself. Such a negative fact was peculiarly within the knowledge of the creditor. If he had had no such notice or actual knowledge, he could easily have testified to that effect. It is, therefore, only the natural and fair presumption that he in fact did have such notice or actual knowledge, else he would have denied it.

3. Nothing in the creditor's affidavit of no defense (p. 7 of the Transcript of Record) can be considered as evidence in favor of the creditor in this case, nor even as a denial by the creditor of notice or actual knowledge.

Mass. Acts of 1911, c. 305 (in force at the time of the trial of this case) relating to such affidavit, provided that "In any trial any affidavit filed by either party, as herein provided, may be given in evidence *against* him."

Mass. Rev. Laws, c. 173, § *85,* provided that "Pleadings shall not be evidence on the trial,

but the allegations therein shall bind the party making them."

Taylor v. *Weingartener,* 223 Mass. 243, at 246,

Where the court says:

"The suggestion of the plaintiff that the denial in the bill sworn to by him was evidence that he denied having received notice of the sale is not tenable . . . Allegations in a bill which is sworn to are admissions of the truth of the facts stated, but they are not affirmative evidence in favor of the plaintiff."

4. Such an affidavit is not even a pleading but merely a statement of reasons which a party, desiring a speedy trial, may file, and is considered *only* on the question of whether the case should be advanced on the trial list. Furthermore, it does not seem to have considered as evidence or in any respect by either of the Massachusetts Courts.

5. In view of the presumption created by Section 21f as to the regularity of the proceedings it must be held in the case at bar that the notice of the first meeting of creditors was duly published as provided by Section 58b of the Bankruptcy Law. Therefore, in view of the creditor's failure to deny, either in his pleadings or by his testimony, that he had notice or actual knowledge of the proceedings, it would be the natural and reasonable presumption that, having had at least constructive notice through such publication, he had had "notice" within the meaning of that word as used in clause (3) of Section 17. And right here it should be noted that Congress in enacting the Bankruptcy Law apparently did not see fit to qualify or limit

the word "notice" in that clause (3) although it did qualify or limit the word "knowledge" in the same clause to "actual knowledge".

D.

THERE APPEARS TO BE A CLEAR CONFLICT BETWEEN THE DECISIONS OF STATE COURTS AS TO THE QUESTIONS RAISED IN THE CASE AT BAR.

The cases supporting the view that the burden is upon the creditor to show *all* the facts necessary to bring his debt within the class excepted by clause (3) of Section 17 from the operation of the debtor's discharge in bankruptcy appear to have been based upon sounder reasoning and are more consistent with the purpose of the Bankruptcy Law than the cases opposed to that view.

A. It is submitted that the case of *Morency* v. *Landry*, 79 N.H. 305, 108 Atl. 855, is the best considered and soundest of the various State court cases in which the question of burden of proof under clause (3) of Section 17 is considered, and is a direct authority to the effect that the burden is upon the creditor to show *all* the facts necessary to bring the debt within the class of debts excepted by said clause (3) from the operation of a discharge.

1. In that case the creditor was the payee of a note which had been signed by the debtor, which note had been discounted at a bank, and the bank having recovered judgment against both the creditor and debtor the creditor had paid the judgment in 1902. In 1906 the debtor went into bankruptcy and in 1912 received his discharge. About 1918 the creditor filed his claim against the estate of the debtor, then deceased. The debtor's discharge having been shown, it appeared that the

creditor's name did not appear in the debtor's schedules but there was no evidence as to whether the debtor knew the creditor's relation to him as a creditor. The court after citing the case of *Stellwagen* v. *Clum*, 245 U.S. 605, at 617, as to the purpose of the Bankruptcy Law and the *Kreitlein* case, expressly held that the Bankruptcy Law, as construed by this Court, imposed upon the creditor the burden of offering evidence tending to show that the debtor, when he filed his petition, knew the creditor's relation to him as a creditor.

2. Furthermore the court expressly declared that in view of that conclusion it was unnecessary for it to consider whether the evidence in the case authorized the finding, which the lower court had made, that the creditor had actual knowledge of the proceedings.

B. In each of the following cases the court in its opinion clearly points out that the burden is upon the creditor to allege or show, not only that the debt was duly scheduled with the name of the creditor, but also that the debtor knew either the facts necessary to enable him to so schedule it or that the creditor had no knowledge of the bankruptcy proceedings, or both.

1. In *Steele* v. *Thalheimer*, 74 Ark. 516, the court, in holding that the creditor was barred by the debtor's discharge in bankruptcy notwithstanding the creditor's contention that he had no notice and that his address had not been correctly given, said: "The act . . . excepts only those (debts) which have not been duly scheduled in time . . . with the name of the creditor, if known to the bankrupt . . . besides it is not alleged or shown

that the bankrupt knew the address of the creditor, or that the failure to give his correct address was intentional or fraudulent."

2. In *Luffoon* v. *Kerner*, 138 N.C. 281, the court says: "The creditor may notwithstanding (the discharge) show that his debt is of the excepted class. The onus, however, is on him and if he fails to make the proof, the debt will be taken to (be) one of an ordinary character. . . ." The court after disapproving one of its early decisions (*Balk* v. *Harris*, 130 N.C. 381) in so far as that decision said that the debtor must show that the debt was scheduled *or* that the creditor had notice, goes on to say: "We are of the opinion that the burden was upon the plaintiff (the creditor) to show that his debt was not scheduled *and* that he had no notice of the proceedings in bankruptcy."

3. In *Manheim* v. *Loewe*, 173 N.Y. Supp. 260 (185 App. Div. 601), the court, after disapproving *Greber* v. *Gault*, 93 N.Y. Supp. 76, 103 App. Div. 511, and referring to *Hyde Park Flint Bottle Company* v. *Miller*, 179 App. Div. 73, as being inconsistent with the *Kreitlein* case, said: ". . . the burden of proof is upon the creditors to show that their claim was *not* properly scheduled *and* they did not have notice of the bankruptcy proceedings."

4. In *Re Peterson*, 121 N.Y. Supp. 738; 137 App. Div. 435, the court in determining the question whether it was necessary for the debtor to show that the debts were not excepted from the operation of the discharge, and there being no proof as to the schedules or notice, said: "If the appellants

(creditors) claimed their debts were excepted because not properly scheduled *and* they had no notice or knowledge—they had the burden of showing the *facts* upon which their claims rested."

5. In *Alling* v. *Straka,* 118 Ill. App. 184, the court said: ". . . If the debt sued on falls within one of the exceptions of the bankruptcy act it is a matter of reply for the plaintiff (the creditor) to make. The burden is upon her to prove it. The burden of proof should follow the pleadings."

6. In the case of *Niles* v. *Havens,* 190 N.Y.S. 656; 198 App. Div. 546, in discussing the effect of a discharge in bankruptcy, the court said:

> "The introduction of such proof of a discharge in bankruptcy makes a prima facie defense; the presumption being that the bankrupt's debts were scheduled properly and that due notice had been given, and the burden then being cast upon the plaintiff in the action to show that because of the nature of the claim, failure to give notice, or other statutory reason the debt sued on was by law excepted from the operation of the discharge."

See also *Van Norman* v. *Young,* 228 Ill. 425.

C. None of the decisions in the cases cited by the Massachusetts Supreme Court as supporting its opinion in the case at bar appear to have been based upon any consideration of the history or purposes of the Bankruptcy Law as heretofore set forth and referred to by this Court in the cases heretofore cited in this brief.

(1) In *Wineman* v. *Fisher,* 135 Mich. 604, the court in holding that the debtor had the burden of prov-

ing that the creditor had no notice or knowledge where it appeared **that the debt was not scheduled**, apparently based its opinion entirely upon Potter's Dwarris, Statutory Const. 119; Sedgwick, Statutory Construction, 2nd ed. p. 93, and 1 Chitty Crim. Law, p. 223, evidently proceeding upon the theory that the purpose of Section 17 of the Bankruptcy Act was to confer upon or grant to a debtor the benefit of having certain of his debts discharged as a result of his bankruptcy proceedings. That such a theory is unsound is clear from the opinion of this Court in the case of *Friend* v. *Talcott, supra.* In the *Talcott case* this Court pointed out that the purpose of Section 17 was to *confer* upon certain *creditors* the right or benefit of having certain debts excepted from the operation of the discharge. That being so the citations in the *Wineman* case would seem to be directly contrary to the holding for which they are cited, for they declare that where a statute creates a *right* or rights and certain exceptions are made therein, the *burden* is upon the party *claiming* such a *right* to negative such exceptions.

(2) The case of *Armstrong* v. *Sweeney*, 73 Neb. 775, was a proceeding brought by the debtor to restrain the sale of his goods on execution. In his petition he alleged not only the discharge but also that the creditor had knowledge of the bankruptcy. The court, in holding that the debtor had not established that the creditor had knowledge apparently based its decision upon the pleadings in the case, saying: "The burden of proof was upon the plaintiff to sustain the allegation of his petition that Hall (the creditor) had knowl-

edge of the bankruptcy proceedings in time to prove his claim." No citations were given, and there was no reasoning in the opinion indicating how the court arrived at its conclusion.

(3) In *Collins* v. *Crews*, 3 Ga. App. 238, the debtor had alleged in his answer that the creditor had actual notice of the proceedings, and in holding that the debtor had failed, on the evidence, to prove such notice, said: "The defendants (the debtors) *having assumed the burden* (of proving notice) the issue in the case turned on whether they could disprove the testimony of Crews and show that Crews had knowledge." No authority was cited and here again the question as to burden of proof apparently was made to depend upon the pleadings.

(4) The case of *Sloan* v. *Grollman*, 113 Md. 192, was a proceeding by the debtor to restrain the enforcement by the creditor of a judgment. It appeared that the **creditor's debt had not been scheduled.** The complainant, the debtor, alleged that he had personally notified the creditor by mail but the creditor denied the allegation. The court, in holding that the debtor had not sustained the burden of proof, without apparently any consideration of the history or purposes of the Bankruptcy Act or the decisions of this Court with respect to it, based its decision upon the authority of the three preceding cases.

(5) The various Texas cases that appear to support the creditor's position in the case at bar are based on a line of decisions in that state which preceded the *Kreitlein* case and held, contrary to the *Kreit-*

lein case, that the burden was upon the debtor to show that the debt did not come within any of the exceptions to the operation of the discharge.

(6) The opinion in *Calmenson* v. *Moudry*, 137 Minn. 123, is based upon the preceding cases and the case of *Bailey's Adm.* v. *Gleason, supra*, which as pointed out above (see p. 28 of this brief) must be considered as in effect overruled by the *Kreitlein* case. The court merely states its conclusion without any reasoning, much less any consideration of the Bankruptcy Law as construed by this Court.

D. The cases of *Miller* v. *Guasti*, 226 U.S. 170, and *Birkett* v. *Columbia Bank*, 195 U.S. 345, are not helpful in the case at bar for in those cases the decisions, as pointed out in the *Kreitlein* case, were based on **extrinsic proof** and on **express** findings that the **debtor knowingly failed** to properly schedule the debt and also that the creditor did **not have notice** or **actual** knowledge of the proceedings prior to the discharge of the bankrupt therein.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE MASSACHUSETTS COURT SHOULD BE REVERSED, AND THAT THE PETITIONERS (THE DEBTOR) ARE ENTITLED ON THE RECORD TO HAVE JUDGMENT ENTERED IN THEIR FAVOR.

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